

SERVED: November 6, 1992

NTSB Order No. EA-3730

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 6th day of November, 1992

_____)	
THOMAS C. RICHARDS,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-12735
v.)	
)	
STEPHEN M. CARTER,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Patrick G. Geraghty rendered in this proceeding on September 18, 1992, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge found that the respondent had on three occasions operated an aircraft for compensation or hire when he did not possess necessary commercial

¹An excerpt from the hearing transcript containing the initial decision is attached.

operating authority. He therefore affirmed an emergency order of the Administrator to the extent it alleged that respondent had violated sections 61.118 and 135.5 of the Federal Aviation Regulations, "FAR," 14 CFR Parts 61 and 135.² However, the law judge, finding no precedent or justification for the sanction of revocation sought by the Administrator, modified the order to provide for a 180-day suspension of the respondent's private pilot certificate.³

On appeal, the respondent contends, among other things, that the charges based on two of the three incidents addressed in the complaint should have been dismissed as stale, that the evidence was insufficient to establish violations with respect to any of the flights, that a prejudicial error occurred in connection with rebuttal evidence admitted concerning one of the two flights he believes should have been dismissed as stale, and that the

²FAR sections 61.118 and 135.5 provide, in relevant part, as follows:

"§61.118 Private pilot privileges and limitations: Pilot in Command.

"Except as provided in paragraphs (a) through (d) of this section, a private pilot may not act as pilot in command of an aircraft that is carrying passengers or property for compensation or hire; nor may he, for compensation or hire, act as pilot in command of an aircraft.

"§135.5 Certificate and operations specifications required.

"No person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part...."

³The Administrator did not appeal this modification.

sanction imposed by the law judge for respondent's operation of the three flights is not in accord with precedent. Based on our review of the administrative record and the parties' briefs on appeal, we agree, as explained below, with the respondent's contention that the law judge erred in not dismissing the charges stemming from the flights that occurred in early 1990.⁴ We do not agree, however, that the evidence does not adequately support the finding of a prohibited flight for compensation or hire on March 16, 1992. We will, accordingly, affirm the Administrator's order and the initial decision as to that flight and modify the order to provide for a 30-day suspension of respondent's airman certificate.⁵

The following allegations concerning the respondent were set forth in the August 21, 1992 Order of Emergency Revocation:

1. At all times hereinafter mentioned, you were, and

⁴The Administrator has filed a reply in opposition to the appeal. Respondent's motion to strike the Administrator's reply brief as untimely is denied. Because the 10-day period for filing a reply ended on a Saturday, the brief did not have to be filed until the following Monday, pursuant to Section 821.10 of the Board's Rules of Practice, 49 CFR Part 821. Respondent's position that the reply had to be filed on the Saturday is based on the apparent belief that because, under this rule, Saturdays, Sundays and legal holidays for the Board must be included in the computation of the deadlines in emergency cases, a deadline falling on such a day is not automatically extended to the next business day for the Board. Although the respondent's contention is not clearly contradicted by the language of the rule, we have consistently applied the automatic extension feature of the rule to filings in emergency cases even though we include non-business days in computing the deadlines for such filings.

⁵Our disposition moots respondent's challenges to the law judge's allowance of rebuttal testimony as to one of the 1990 flights and to his imposition of a 180-day suspension for the three incidents set forth in the complaint.

presently are, the holder of Airman Certificate No. 2052064, with private pilot privileges.

2. On or before March 27, 1990, you acted as pilot-in-command of a civil aircraft used for a charter flight to transport Mrs. Terry E. Savage from Imperial, Nebraska, to Lincoln, Nebraska.
3. On or about July 12, 1990, you acted as pilot-in-command of a civil aircraft used on two (2) round trip charter flights for the Imperial Grade School Foundation from Imperial, Nebraska, to Denver, Colorado.
4. On or about March 16, 1992, you acted as pilot-in-command of Civil Aircraft N123TC, a Beechcraft Baron Model 58B, on a passenger carrying charter flight from Imperial, Nebraska, to Lincoln, Nebraska.
5. Incident to all of the above-mentioned flights, you:
 - a) were compensated by the passengers flying them as stated;
 - b) did not hold a commercial pilot certificate; and
 - c) did not have an air taxi/commercial operating certificate nor appropriate operations specifications to conduct charter operations.

No additional information relevant to the circumstances of any of the flights was included in the order, which served as the complaint in this proceeding. The evidence at the hearing established, however, that none of the flights involved a holding out by respondent to perform a transportation service for a charge. Rather, in each instance, two of which were prompted by exigent circumstances, he was requested to make the flights and did so to accommodate the needs of others.

In rejecting the respondent's motion to dismiss, as stale,⁶

⁶Section 821.33 of the Board's rules of practice authorizes

the charges with respect to the flights described in paragraphs 2 and 3 of the complaint, the law judge concluded that because the Administrator had only taken about four months to issue a notice of proposed certificate action after learning of those flights in April, 1992, while investigating the March 16, 1992 flight, he had acted with reasonable diligence.⁷ We do not disagree that action within that time frame may well be a significant factor supporting a judgment that the Administrator moved with due diligence. However, in order for the Administrator to defeat the respondent's motion to dismiss under Rule 33, he had to show that he had in fact expedited the investigation and paperwork on the suspected violations; that is, that he had processed the facially stale charges "with greater dispatch than" they would have received had they been discovered more or less contemporaneously.

See Administrator v. Brea, NTSB Order No. EA-3657 at 4 (served September 4, 1992), citing, among other cases, Administrator v.

(..continued)
a motion to dismiss

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for the proposed action under section 609 of the [Federal Aviation] Act....

⁷If the complaint had presented a qualification issue, the extent of the Administrator's diligence would not be relevant. However, precedent does not support the conclusion that this type of case presents an issue of qualification, warranting revocation; and although he initially prosecuted this case as an emergency revocation, the Administrator, in his reply brief, urges us to affirm the law judge's 180-day suspension as being in accordance with precedent and policy.

Lujan, 4 NTSB 153, 154 (1982). Because the record before us contains no indication that the Administrator treated the March and July, 1990 flights as non-routine, priority matters, there was no sufficient basis on which the law judge could fairly conclude that the delay in prosecuting them was excusable for good cause shown. Consequently, the motion to dismiss as stale the allegations concerning the 1990 flights should have been granted.

With regard to the March 1992 flight, we concur in the law judge's conclusion that the evidence established the violation alleged. To begin with, it is clear that the respondent and his friend's sick father had no common purpose in flying to Lincoln. Moreover, the respondent has not shown error in the law judge's assessment that his transporting of that individual in the early morning hours to Lincoln for admission to a hospital there was not incidental to a previously planned, though unscheduled, trip to enable respondent to have his aircraft radio checked out. Finally, respondent's essentially admitted subsequent efforts to recover, as had apparently been promised to him, the full cost of the trip precludes any conclusion that the flight falls within the only regulatory exception to the prohibition against a private pilot's acceptance of payment for a flight; namely, where the expenses of a trip are shared with passengers. See FAR section 61.118(b).

As to the matter of sanction, we think the single unauthorized flight respondent made fits within the line of cases

that have taken into account the non-economic factors that contributed to the airman's conduct. See Administrator v. Sabar, 3 NTSB 3119, 3121 at n. 5 (1980) ("Moreover, in this case, as in [Administrator v. Jones, 2 NTSB 1869 (1975)], the motive behind the unauthorized operation was not purely financial, but appears to have resulted in part from an effort to accommodate the desires of friends."). Here, a longtime acquaintance of respondent importuned respondent in the middle of the night to fly the acquaintance's father, believed by him to be suffering a kidney failure, to Lincoln so that the father would be spared the discomfort and possible medical complications of an extended trip by car. There is no suggestion in the record that the respondent had in any way previously held himself out as available to perform such a flight for compensation or otherwise; it does not appear that any commercial operator existed in Imperial, Nebraska, who could have accommodated such a request; and the acquaintance who solicited respondent's immediate help in what he represented to be a medical emergency does not appear to have believed that respondent had any commercial authorization to perform the flight. In light of these circumstances and relevant precedent, we think a 30-day suspension of respondent's airman certificate would be sufficient to vindicate the public interest in ensuring that only properly certificated commercial operators perform commercial services and, at the same time, to impress upon respondent the necessity of compliance with regulations despite the difficult choices that strict adherence to them may

occasionally entail.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is granted in part and denied in part;

2. The order of emergency revocation and the initial decision are affirmed to the extent they are consistent with this opinion and order, and are otherwise reversed; and

3. The order of emergency revocation is modified to provide for a 30-day suspension of respondent's private pilot certificate.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.